No. 14-556

Supreme Court, U S
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Supreme Court of the United States

JAMES OBERGEFELL, *et al.*,

Petitioners,

—v.—

RICHARD HODGES, Director,
Ohio Department of Health, *et al.*,

Respondents.

BRITTANI HENRY, *et al.*,

Petitioners,

—v.—

RICHARD HODGES, Director,
Ohio Department of Health, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Ohio's opposing brief is remarkable for what it does *not* say. Replete with abstract disquisitions on federalism and democracy, it neglects to acknowledge what is at the heart of these cases: *real* people—men, women, and children—who seek basic dignity and equality. Petitioners range from a toddler adopted by a married same-sex couple to same-sex married parents to grieving widowers. They seek recognition of the marriages that should protect their families from cradle to grave and beyond. Yet Ohio assiduously avoids acknowledging what the Sixth Circuit majority conceded, that the State's refusal to recognize Petitioners' marriages inflicts profound harms on these spouses and their children. Pet. App. 40a.

Nor, as Ohio suggests, can these harms be excused as the unintended by-product of a benign tradition reserving marriage to different-sex couples. Instead, in 2004 Ohio's legislators and voters abandoned the State's long practice of recognizing existing out-of-state marriages, even if unavailable within the State, for the express purpose of imposing inequality on same-sex couples whose relationships had been dignified by marriage in sister jurisdictions.

The State also attempts to drain all meaning from this Court's landmark decisions regarding individual rights to liberty and equality. From *Loving v. Virginia*, 388 U.S. 1 (1967), through *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), this Court's precedents make clear that Ohio may not, without even a legitimate, much less compelling, government interest, single out a

disfavored group to deny recognition to their marriages. Such a profound intrusion on Petitioners' equal dignity is justified neither by principles of federalism nor by calls for unfettered democracy.

On one point, Petitioners and Ohio agree. If the Court rules that states may not constitutionally prohibit same-sex couples from marrying—a ruling Petitioners urge—then states likewise may not refuse to recognize the out-of-state marriages of same-sex couples. Ohio Br. 10, 51. But even without such a ruling, the recognition bans *independently* violate constitutional guarantees of liberty and equality.

ARGUMENT

I. The Recognition Bans Are Unconstitutional Under *Windsor*

As discussed in Petitioners' opening brief, Pet. Br. 20-32, Ohio's recognition bans parallel Section 3 of DOMA in all relevant respects. In striking down DOMA, *Windsor* did not expressly reference whether the Constitution protects the freedom of same-sex couples to marry. *See Windsor*, 133 S. Ct. at 2696. But even without directly reaching that question, this Court held that the federal government's refusal to recognize the existing legal marriages of same-sex couples deprived those couples and their families of constitutionally protected liberty and equality. The same is true here. Should this Court decline to rule for Petitioners on the licensing question, *Windsor* demonstrates that the recognition bans are nonetheless unconstitutional.

A. Neither Principles Of Federalism Nor Respect For Ohio's Political Process Justify The Bans

Although conceding that *Windsor* did not rest on DOMA's disruption to federalism, Ohio Br. 16, Ohio nonetheless casts *Windsor* as elevating states' rights over the constitutional rights of the individual. *Windsor*, however, rests on a very different understanding. "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691. Indeed, our casebooks are full of precedents, in marriage and other contexts, in which federal courts have enforced bedrock constitutional rights of individuals, particularly minorities, when states have transgressed constitutional constraints. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95, 99 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *Loving*, 388 U.S. 1. These constitutional landmarks and the American commitment to liberty and equality they embody—which rightly impose limits on the abstract principles of federalism and democracy invoked by Ohio—remain lodestars and sources of great national pride. Ohio breached this commitment in enacting the recognition bans.

While states have considerable leeway to function as laboratories of experimentation, they do not have leeway to function as laboratories of discrimination. And "when hurt or injury is inflicted ... by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." *Schuette v. Coal. to Defend Aff. Action*, 134

S. Ct. 1623, 1637 (2014) (Kennedy, J., plurality);[1] *see also* Mehlman Br. 28-29; Constitutional Account. Ctr. Br. 5-23.

Ohio asserts that the Court's intervention here "would undermine Ohioans' liberty to decide this issue, just as *Windsor* said that DOMA had limited New Yorkers' liberty to do so." Ohio Br. 6. This is a false comparison. New Yorkers *granted* same-sex couples a status the federal government sought to deny; Ohio has *denied* a status other states granted. *Windsor* recognized that New York's "decision to give this class of persons the right to marry" allowed "them a dignity and status of immense import," which non-recognition undermined. *Windsor*, 133 S. Ct. at 2692. Once a couple has obtained that status through lawful marriage, the Constitution prevents other sovereigns from stripping it absent a compelling government justification. Ohio Petitioners James Obergefell and David Michener deserve respect for the marriages they lawfully entered with their departed spouses, not the added grief of their State's insult to the integrity of their families. Likewise, Petitioners Joseph Vitale and Robert Talmas sought to attain the dignity and status of marriage when they married and adopted their son in their home state, New York. Yet from hundreds of miles away, Ohio denies this New York

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[1] *Schuette* in no way supports withholding redress for voter-imposed constitutional violations. *Schuette* counsels deference to state voters' choices between competing *constitutionally valid* policies. *Id.* at 1635 ("The constitutional validity of ... choices regarding racial preferences is not at issue here."). It does not allow state voters to choose *unconstitutional* policies over constitutional ones.

family full dignity and protection even "in their own community." *Ibid.* The corrosive effects of Ohio's discrimination against same-sex married couples thus spill far beyond Ohio's borders.

Ohio also attempts to boost its federalism claims by arguing that any "social change" resulting from Ohio's recognition of Petitioners' marriages must be obtained through the democratic process, not judicial review. Ohio Br. 21-24. According to Ohio, Petitioners' only route to recognition of their marriages is through exercise of their First Amendment rights to seek "public consensus" on the validity of their unions. Ohio similarly argues that striking down the bans interferes with rights of those who voted for them to participate in the political process. Ohio Br. 24-29. But nothing in *Windsor* supports relegating the fates of Petitioners and their children exclusively to Ohio's political arena. If federalism required public consensus as a prerequisite to invoking constitutional rights, then many of this Court's landmark decisions, including *Loving*, would not exist.

Contrary to Ohio's suggestion, *Windsor* supports this Court's vindication of Petitioners' constitutional rights to liberty and equality. In *Windsor*, this Court recognized "the urgency of this issue for same-sex couples," 133 S. Ct. at 2689, and the courts' responsibility to remedy the discrimination. *Id.* at 2688. The four circuit courts and dozens of state and lower federal courts that in the past two years have declared unconstitutional state laws denying marriage rights to same-sex couples have not "restrict[ed] liberty," as Ohio suggests. Ohio Br. 19. *See* Lambda Legal, Favorable Rulings in Marriage

Equality Cases Since *U.S. v. Windsor* (Feb. 26, 2015), *available at* http://www.lambdalegal.org/sites/default/files/post-windsor_cases_ruling_in_favor_of_marriage_equality_claims_as_of_feb_26_2015.pdf. Quite the opposite. These rulings have immeasurably enhanced the liberty—as well as the day-to-day security and well-being—of lesbian and gay Americans and their families. Today, same-sex couples have statewide marriage rights in twenty states as the result of federal court constitutional rulings, with sixteen more states and the District of Columbia granting marriage rights and recognition as the result of state court decisions, legislation, or state constitutional measures—leaving Ohio and the other Sixth Circuit states in the distinct minority. 379 Emp. Br. 16-17. This recognition of the equal dignity of gay people and their families enhances the liberty of *all*, affirming that when any of us makes the intimate and profound choice to be married to the one person we love, the state-protected marriage that results cannot be unilaterally dissolved by another sovereign. Neither our legislators, nor our neighbors, nor the people of far-off states have veto power over this choice, because the Constitution gives each of us that protection.

B. Ohio's Recognition Bans, Like DOMA, Were Motivated By The Impermissible Purpose To Impose Inequality On Married Same-Sex Couples

Ohio mistakenly argues that the recognition bans were not based on the same negative attitudes or "animus" towards same-sex couples this Court found in *Windsor*. Ohio Br. 8, 29-35. In fact, the same

impermissible purpose animated both DOMA and Ohio's recognition bans.

First, Ohio misrepresents the legal concept of "animus," which, applied here, would neither "demean millions of Ohioans" nor treat their "beliefs about marriage as sheer bigotry." Ohio Br. 8. As explained in Petitioners' opening brief, Pet. Br. 24, unconstitutional discrimination "rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring); *see also* Human Rights Campaign Br. 6-8. Just as this Court's ruling in *Windsor* did not "demean" or treat as "sheer bigotry" the beliefs of the members of Congress who enacted DOMA and President Clinton who signed it, neither would a ruling striking down Ohio's bans amount to such a statement about Ohioans.

Second, Ohio's recognition bans unmistakably share DOMA's impermissible purpose to impose inequality on married same-sex couples. The State disingenuously claims that the 2004 recognition bans were merely the benign continuation of centuries of "traditional marriage" and states' refusal to recognize "void" marriages entered in other jurisdictions. Ohio Br. 34-35. To the contrary, throughout history same-sex couples were invisible at best, and pariahs at worst, whose love was disdained as "a crime not fit to be named." *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, J. concurring) (citation omitted). But "later generations can" and do "see that laws once

thought ... proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579. And, in more recent times, "[t]he limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in" many states and nations "as an unjust exclusion." *Windsor*, 133 S. Ct. at 2689. The legislative history and context of the recognition bans make crystal clear that their purpose, precisely parallel to DOMA's, was to withdraw all legal protections and respect same-sex couples would gain in Ohio by exercising the right to marry in other jurisdictions. Pet. Br. 4-6, 21-23; Human Rights Campaign Br. 9-26.

C. Ohio's Bans, Like DOMA, Are An Unusual Departure From Marriage Recognition

Finally, Ohio argues that unlike in *Windsor*, where there was a clear departure from a long-standing practice of federal recognition of state marriages, there is no comparable deviation here. To support this position, Ohio relies on dicta in Ohio cases unremarkably noting that the State theoretically could refuse recognition to a marriage so violative of public policy that it should be regarded as void, meaning a "marital relationship ... without semblance of validity." *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 209 (Ohio 1958). According to Ohio, the 2004 recognition bans were thus perfectly in keeping with its comity practices. Ohio Br. 32-33. But mere recitation of the State's hypothetical authority to withhold recognition under exceptional circumstances does not make less suspect the recognition bans' actual departure from Ohio's longstanding practice of comity. *Windsor* too noted

that the federal government retains authority in some contexts to "regulate the meaning of marriage in order to further federal policy." 133 S. Ct. at 2690. Yet the Court concluded that DOMA's departure from the federal government's general recognition of state-conferred marital statuses violated due process and equal protection.

In reality, Ohio cannot point to a single case prior to the 2004 bans in which the exceedingly high threshold for non-recognition was ever met. Indeed, Ohio has recognized out-of-state marriages between first cousins and of underage minors. Pet. App. 190a-191a; Conflict of Laws and Family Law Profs. Br. ("Conflicts Br.") 16-17. Ohio, like the other states whose laws are under review, has also adhered to the place of celebration rule even when the couple married in another jurisdiction specifically to evade their home state's marriage restrictions. Conflicts Br. 16-17; *Mazzolini*, 155 N.E.2d at 208-09.

Likewise unprecedented was Ohio's enactment, both by statute and constitutional amendment, of a blanket ban singling out one class of persons to deny all recognition to their marriages. Historically, in Ohio and nationwide, marriage recognition was a matter of individualized determinations by courts applying common law standards. Conflicts Br. 3. And in practice, "[courts] have been quite reluctant to use the exception and quite liberal in recognizing marriages celebrated in other states." Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 Quinnipiac L. Rev. 61, 68 (1996).

Ohio's recognition bans, however, categorically refuse to recognize any marriage consistent with a

gay or lesbian person's sexual orientation, namely, a marriage with a person of the same sex. Equating all marriages of same-sex couples with relationships lacking even a "semblance of validity," *Mazzolini*, 155 N.E.2d at 209, only highlights that the State seeks to delegitimize and devalue the same-sex relationships that define in significant part what it means to be gay. *See Lawrence*, 539 U.S. at 583. Even when anti-miscegenation bans voided and criminalized interracial marriages in many states, courts nonetheless widely gave interstate recognition to such marriages. One of the few departures from that practice ultimately resulted in this Court's ruling in *Loving*. Conflicts Br. 6-7.

Thus, Ohio relies on "narrow," "oft-cited," but "rarely applied" exceptions to the place of celebration rule that have grown "nearly vestigial after the demise of anti-miscegenation laws." *Id.* at 2. The bans represent "[d]iscriminations of an unusual character," departing from Ohio's—and the nation's—overwhelming "history and tradition" to afford legal respect to marriages validly entered in other jurisdictions. *Windsor*, 133 S. Ct. at 2692 (citation omitted); *see also Lawrence*, 539 U.S. at 568-73 (relying on historical lack of enforcement of sodomy bans or of laws specifically targeting same-sex couples in striking down sodomy prohibitions).

In 2004, Ohio reached a crossroads. Rather than remain on the long-trod path of marriage recognition, Ohio and other states veered in a different direction. With same-sex couples able to marry elsewhere, such marriages inevitably would receive legal recognition in Ohio under the place of celebration rule—just as occurred in New York and other states that declined

to enact recognition bans like Ohio's. *See Windsor v. United States*, 699 F.3d 169, 177-78 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013); *Port v. Cowan*, 44 A.3d 970, 978-82 (Md. 2012); N.M. Op. Att'y Gen. 11-01 (Jan. 4, 2011), *available at* http://goo.gl/2MIP7B; R.I. Op. Att'y Gen. (Feb. 20, 2007), *available at* http://goo.gl/IsQHGe. By enacting both a statute and a constitutional amendment for the express purpose of withdrawing "official status, recognition and benefits to homosexual and other *deviant* relationships that seek to imitate marriage," J.A. 170 (emphasis added), Ohio chose a new path of discrimination.

In the most basic sense, then, Ohio denied same-sex couples the equal protection of its laws. The recognition bans' design, purpose, and effect were to claw back rights to marriage recognition and accompanying legal protections that same-sex couples would otherwise enjoy in Ohio. The recognition bans thus violate the Fourteenth Amendment, independent of the constitutional violation imposed by licensing bans.

II. Ohio's Refusal To Recognize Petitioners' Marriages Triggers Heightened Scrutiny Under The Due Process Clause

This Court has confirmed in more than a dozen cases that the Due Process Clause protects both the fundamental right to be married and the legal protections that flow from an existing marriage. Perry Br. 4-5; Pet. Br. 32-38. Ohio argues that same-sex couples should be excluded from these bedrock constitutional protections because historically they were excluded from marriage. For all the reasons other couples have the right to demand recognition of

their marriages wherever they may live, travel, or move, so too do Petitioners. Pet. Br. 32-38.

1. Ohio suggests that both the licensing and recognition bans are constitutional because the protected right to be married differs from a claim to so-called "same-sex marriage," which Ohio contends has no mooring in tradition. Ohio Br. 37. But a fundamental right does not belong exclusively to those who have historically enjoyed it. And to define the right in question by its narrowest level of generality, when that is the very law being challenged, is completely circular. In this sense Ohio's argument replicates the error of *Bowers*, which likewise recast the asserted right to consensual intimacy with the person of one's choice—a right shared by all consenting adults—to an overly narrow claimed right of "homosexuals to engage in sodomy." *Lawrence*, 539 U.S. at 566-67 (quoting *Bowers*, 478 U.S. at 190). There can be no question that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574; *see also Bourke* Pet. Br. 21-22; *Tanco* Pet. Br. 20; Perry, et al. Br. 4-8.

2. In addition, whether or not the Constitution protects a particular couple's fundamental right to marry in the first instance, the Constitution independently protects the dignity of a marriage once legally entered. Even without expressly referencing the fundamental right to marry in *Windsor*, this Court struck down DOMA because it impermissibly

"displace[d] [the] protection" of marriage and treated some married couples "as living in marriages less respected than others." *Windsor*, 133 S. Ct. at 2696.

That is because, even if the fundamental right to marriage did not apply, due process would still protect "choices to ... *maintain* certain intimate human relationships ... against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984) (emphasis added); *see also Zablocki*, 434 U.S. at 397 n.1 (Powell, J., concurring) ("there is a sphere of privacy or autonomy surrounding an *existing* marital relationship into which the State may not lightly intrude" (emphasis added)). It is difficult to imagine a more significant intrusion into family life than the voiding of one's constitutionally protected marriage. And where the government "undertakes such intrusive regulation of the family, ... the usual judicial deference to the legislature is inappropriate." *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977).

Ohio does not attempt to justify this significant intrusion directly but instead disputes that *anyone* has the fundamental right to recognition of a marriage. According to Ohio, a "fundamental right is a right *against* government, not a right *to* government." Ohio Br. 38. Ohio then characterizes marriage as merely a right *to* a government benefit that the government can deny if it chooses. But marriage is not simply a benefit the government can grant or withhold at its discretion. Nor is it a purely private relationship carried on behind closed doors in

one's home. As this Court has confirmed, marriage is a "public commitment" and "pre-condition to receipt of government benefits," many of which can be accessed only through state recognition of the marriage. *Turner*, 482 U.S. at 95-96; *see also Windsor*, 133 S. Ct. at 2691, 2694. The status of being married is conferred exclusively by the government, which holds a monopoly on both entry and exit and "oversee[s] many aspects of [the] institution." *Boddie*, 401 U.S. at 375. Thus the decision to be married, though an exercise of personal autonomy, is impossible without a state-conferred license and ongoing government recognition. Under these circumstances, the distinction between negative and positive rights dissolves. *See In re Marriage Cases*, 183 P.3d 384, 426-27 (Cal. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 992 n.14 (Mass. 2003).

Ohio's interference with Petitioners' rights to the protections of marriage and its intrusion into the constitutionally protected sphere of their existing marital relationships is profound. The bans make it impossible for the Henry-Rogers, Yorksmith, Noe-McCracken, and Vitale-Talmas Petitioners to obtain accurate birth certificates for their children, for Petitioners Obergefell and Michener to receive accurate death certificates for their spouses, or for Petitioners to receive a myriad of other protections the government guarantees married couples and their families through all other phases of life.

3. Ohio cannot avoid the protections of the Due Process Clause by arguing that the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, exclusively governs whether Petitioners have a substantive right

to recognition of their marriages. Ohio Br. 11-13. Petitioners do not advance a claim to marriage recognition under that Clause, nor do they need to. The Fourteenth Amendment trumps any authority the states might have under the Full Faith and Credit Clause to disrespect the marriages at issue here. *See, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("Eleventh Amendment, and the principle of state sovereignty which it embodies ... are necessarily limited by ... the Fourteenth Amendment." (citation omitted)); *Schick v. United States*, 195 U.S. 65, 68-69 (1904) (later-enacted constitutional amendments prevail over other constitutional provisions).

Ohio's assertion that the Full Faith and Credit Clause is a more specific constitutional provision that displaces Petitioners' substantive due process rights is wrong as well. The right to be married invoked by Petitioners finds its source in the due process guarantee, as this Court has long held. *See, e.g.*, *Zablocki* 434 U.S. at 383-84. Petitioners' claim is most directly "covered by" that provision, not the Full Faith and Credit Clause. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). Indeed, *Loving* itself struck down Virginia's refusal to recognize an out-of-state marriage without mentioning the Full Faith and Credit Clause. A state measure "that does not contravene one of the more specific guarantees of the Bill of Rights may nonetheless violate the Due Process Clause if it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Albright v. Oliver* 510 U.S. 266, 282 (1994) (Kennedy, J., concurring) (citation and quotation omitted).

III. Ohio's Discrimination Based On Sexual Orientation Triggers Heightened Scrutiny Under The Equal Protection Clause

1. The arguments of Ohio, other Respondents, and their amici demonstrate the need for an explicit holding from this Court that traditional rational basis review—and the presumption of constitutionality it expresses—is not the correct standard to apply to laws that explicitly discriminate based on sexual orientation. Unchecked convictions that lesbian and gay individuals and their children do not need or deserve the same legal protections as others leave them vulnerable to more discriminatory laws like those at issue here. *Cf. Lawrence*, 539 U.S. at 575 (framing holding to avoid an "invitation to subject homosexual persons to discrimination both in the public and in the private spheres" and to end precedent that "demeans the lives of homosexual persons"). An explicit holding that the government must have an exceedingly strong justification to engage in de jure discrimination based on sexual orientation will speed to an end the class-based legislation that continues to afflict this minority. *See* U.S. Br. 11-12, 20-21; Constitutional Law Scholars Br. 18-19.

Indeed, all the factors this Court has considered in applying heightened scrutiny are in full force for sexual orientation-based classifications. Tellingly, Ohio all but ignores the core heightened scrutiny considerations present here: lesbian and gay people have suffered a history of extraordinary discrimination, and sexual orientation has absolutely no bearing on one's ability to contribute to society. U.S. Br. 17-19; Constitutional Law Scholars Br. 7-13.

In keeping with its theme that Ohio voters should determine Petitioners' constitutional rights, Ohio argues that lesbian and gay people can protect themselves through the political process. This is a massive overstatement both of what this factor has meant in past cases and of the relative political power of gay people today. U.S. Br. 23-24; Constitutional Law Scholars Br. 13-19.

2. Ohio unabashedly claims that the recognition bans do not even discriminate based on sexual orientation because Ohio *could* deny recognition to other "void" marriages. Ohio Br. 45. But the only marriages the recognition bans withdraw protection from are those not "between one man and one woman." Ohio Const. art. XV, § 11; *see also* Ohio Rev. Code Ann. § 3101.01(C)(2). As this Court has made clear, laws targeting same-sex couples intrinsically target lesbian and gay individuals, and therefore classify based on sexual orientation. *See, e.g.*, *Lawrence*, 539 U.S. at 575; *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010). That in theory the State *might*, but did not, enact a ban targeting another group's marriages does not make the challenged bans' sexual orientation-based classification any less intentional or severe.

IV. Ohio's Discrimination Based On Sex Triggers Heightened Scrutiny Under The Equal Protection Clause

Ohio's recognition bans expressly classify individuals based on sex, permitting men to be married only to women and women to be married only to men. Ohio is wrong to suggest heightened scrutiny is not warranted because the law "treat[s] both genders equally." Ohio Br. 50. *J.E.B. v.*

Alabama ex rel. T.B., 511 U.S. 127 (1994), rejected this "equal application" argument, applying heightened scrutiny to peremptory challenges striking individual jurors based on sex even though the practice applied equally to men and women as groups. The *J.E.B.* dissent argued, as Ohio does here, that "the system as a whole is evenhanded," *id.* at 159 (Scalia, J., dissenting), but the majority responded that the "argument has been rejected many times, ... and we reject it once again." *Id.* at 143 n.15. Because equal protection protects the "dignity" of "individuals, not groups," *id.* at 152-53 (Kennedy, J., concurring), laws constraining a person's choices based on their sex receive heightened scrutiny. *See* Legal Scholars Stephen Clark, et al. Br. 9-14. Moreover, the recognition bans revive the "invidious, archaic, and overbroad stereotypes" about appropriate sex roles in marriage and parenting prompting this Court to apply heightened scrutiny to sex-based classifications in the first instance. *J.E.B.*, 511 U.S. at 131.

V. Ohio's Recognition Bans Serve No Purpose Other Than To Impose Inequality, Failing Any Standard Of Review

The recognition bans are properly subject to heightened scrutiny, but they fail *any* level of review. Rational review is not simply the rubber-stamp Ohio portrays. *See* Pet. Br. 49-51; Freedom to Marry Br. 5-19; Institute of Justice Br. 5-23. Particularly in challenges to laws depriving disfavored groups of dignity and liberty, rational review "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law" by requiring that a "classification bear a rational

relationship to an independent and legitimate legislative end." *Romer*, 517 U.S. at 633.

Ohio simply recasts its federalism and democracy arguments as purported government interests. Indeed, all of Ohio's asserted government interests boil down to the majority's bald desire to deny same-sex couples the protections that come with recognition of marriages entered out of state. Ohio offers no legitimate government ends in themselves, independent of the classification drawn by the bans.

Perpetuating "in-state control" rationale (Ohio Br. 52-54). The circularity of this rationale is plain. Ohio argues that it decided to deprive same-sex couples the recognition their out-of-state marriages would otherwise receive so that Ohio could decide whose marriages receive recognition within its borders. This demonstrates only that Ohio wanted to enact the bans, not any legitimate purpose the bans advance. The fact that Ohio recognizes other out-of-State marriages that could not lawfully be entered in Ohio also indicates "in-state control" is a pretext.

"Discouraging evasion" rationale (Ohio Br. 55-56). Ohio similarly claims that it enacted the recognition bans so that Ohio same-sex couples unable to marry in the State would not marry elsewhere. This just highlights the recognition bans' dramatic departure from Ohio's longstanding place of celebration rule, under which couples who "evaded" Ohio law nonetheless were entitled to recognition as married on their return home. *See, e.g., Slovenian Mut. Ben. Ass'n v. Knafelj*, 173 N.E. 630, 631 (Ohio Ct. App. 1930); *see also* Conflicts Br. 16-17. And again, Ohio fails to advance an independent justification for

withholding recognition to lesbian and gay spouses, beyond the bare desire to do so.

Maintaining "uniformity" rationale (Ohio Br. 56-57). Ohio asserts that discriminating against both same-sex couples seeking to marry in-state and those who marry out-of-state maintains desirable "uniformity." But the desire to uniformly deny all same-sex couples protection of the laws is not a permissible end in itself. In any case, the recognition bans create *dis-uniformity* between different kinds of Ohio couples married out-of-state. And Ohio's asserted concerns around "gender-specific" terms relating to marriage rights are a makeweight. Ohio Rev. Code Ann. § 1.43(B) already provides that "[w]ords of one gender include the other genders," eliminating purported difficulties in construing laws regarding spouses. The many states with marriage rights for same-sex couples have easily recognized same-sex spouses under their legal frameworks.

Preserving the majority's "democratic choices" rationale (Ohio Br. 54-55). Ohio contends that it enacted the bans to ensure that its judiciary would not uphold out-of-state marriages of same-sex couples under its comity and constitutional jurisprudence. Of course, this underscores the bans' "unusual deviation from the usual tradition" that *would have* otherwise recognized Petitioners marriages. *Windsor*, 133 S. Ct. at 2693. In short, this rationale simply restates the majority's purpose "to impose a disadvantage" and "a separate status" on same-sex married couples, *ibid.*, rather than providing an independent justification for the bans.

Related to its argument about democratic choice, Ohio suggests that Petitioners' suffering should be

prolonged because Ohio might want to fold consideration of religious objection provisions into future political debate about recognition bans. Ohio Br. 27, 33. But Ohio remains free to debate and enact such provisions—within constitutional constraints—either before or after a ruling by this Court. Similar religious objections to same-sex relationships could not justify denying lesbian and gay people their constitutional rights in *Windsor*, 133 S. Ct. at 2693; *Lawrence*, 539 U.S. at 571; or *Romer*, 517 U.S. at 635, and they should not prevail in this context either. *See* Pres. of House of Deputies of Episcopal Church, et al. Br. 27-36.

"Stability" and "wait and see" rationale (Ohio Br. 57-58). This same unsubstantiated rationale—that maintaining an unmarried "status quo" for lesbian and gay individuals serves an interest in proceeding with caution—was already implicitly rejected by this Court in *Windsor*. Pet. Br. 53. Far from a passive desire to "wait and see," the recognition bans were an affirmative attempt to undo the advances same-sex couples have achieved in other states. *Id.* at 53-54. Indeed, the reality that certain discriminatory practices with "a long history in this country" were judicially tolerated in the past is "not a reason to continue to do so. Many of 'our people's traditions' ... are now unconstitutional even though they once coexisted with the Equal Protection Clause." *J.E.B.*, 511 U.S. at 142 n.15.

Some amici supporting Ohio similarly suggest that requiring the State to recognize marriages entered elsewhere would "redefine" and displace the "traditional" view of marriage as a male-female institution. The public understanding of marriage

has changed significantly over time, however. Historians of Marriage, et al. Br. 9-11, 16-22. Requiring recognition of same-sex couples' marriages in order to end "impermissible stereotypes" that "denigrate[] the dignity" of those historically excluded, *J.E.B.*, 511 U.S. at 139 n.11, 142, would no more improperly change marriage's "definition" than requiring states to allow women to serve on juries improperly changed the traditional understanding of a jury as an all-male institution. *See id.* at 136.

Similarly, a decision upholding the liberty of same-sex couples to marry would not amount to an endorsement of a particular vision of marriage. It would simply allow individuals to make those decisions for themselves. For example, the Yorksmith Petitioners married in part to build a base of stability and support for the family of four they have gone on to create. J.A. 397-399. Petitioner Obergefell married John Arthur in part to give his dying husband the greatest reassurance possible that he would stand by him and care for him through the last days of Arthur's life. J.A. 25-27, 37-39. Many married couples have different views of the purpose and meaning of their marriage, which may even change over the course of their married life, without causing harm to the views of other married couples or anyone else.

In sum, neither Ohio, the other Respondents, nor their amici offer a single rationale for the recognition bans that can justify the burdens imposed on Petitioners and others like them.[2] The bans serve no

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[2] Ohio does not advance the arguments raised by other Respondents and their amici that the bans are justified by

purpose other than the impermissible one of imposing inequality on married lesbian and gay couples. "[A] court applying rational basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications." *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring).

* * *

In the end, Ohio suggests that "only in communities, not courtrooms," can "'the people, gay and straight alike ... become the heroes of their own stories.'" Ohio Br. 27, quoting Pet. App. 69a. But Petitioners did not bring these actions to "become heroes." They want no more and no less than the basic dignity of legal equality for their marriages in Ohio. Petitioners have waited through the birth of children and the death of spouses without the security and dignity afforded other families. They should not be made to continue to suffer until some indefinite day when Ohioans become "heroes" in Respondent's story by repealing the destructive recognition bans the majority enacted. *See Watson v. Memphis*, 373 U.S. 526, 537 (1963) ("[C]ommendable good will between the races, [rather than] supporting the need for further delay, can best be preserved and extended by the observance and protection, not the

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"optimal parenting" or "responsible procreation"—for good reason. Neither of these purported justifications legitimize the recognition (or licensing) bans. *See* Pet. Br. 55-59; Am. Psych. Ass'n, et al. Br. 22-30; Am. Sociol. Ass'n Br. 14-27.

denial, of the basic constitutional rights here asserted. The best guarantee of civil peace is adherence to, and respect for, the law."). Our Constitution guarantees to each of us the ultimate dignity of liberty and equality that does not depend on the sufferance of our neighbors.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be reversed.

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